STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 9

The League of Women Voters of Wisconsin, *et al.*, *Plaintiffs,* v. Dean Knudson, *et al.*, *Defendants.*	Case No. 19-cv-84

THE LEGISLATURE'S BRIEF IN SUPPORT OF ITS PROVISIONAL MOTION TO DISMISS AND ITS PROVISIONAL RESPONSE TO PLAINTIFFS' MOTION FOR A TEMPORARY INJUNCTION

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INTRODUCTION

Plaintiffs' Amended Complaint is based upon such an unprecedented, implausible theory that they are unable to cite a single example of a scholar, litigant, or public official articulating such an objection in the decades that the Wisconsin Legislature has been using the common legislative mechanism in dispute here. Plaintiffs' theory is that because the Legislature did not enact a specific law that authorizes it to gather in a floor period in December 2018, in particular, everything that the Legislature did during that floor period violates Article IV, Section 11 of the Wisconsin Constitution. But nothing in Article IV, Section 11's text or history supports Plaintiffs' claim. Article IV, Section 11 merely provides, in relevant part, that the "legislature shall meet at the seat of government at such time as shall be provided by law." As explained in 2017 Enrolled Session Resolution 1, which the Legislature enacted pursuant to Wisconsin Statute Subsection 13.02(3), the Legislature "me[]t" for the 2017-2018 biennial session on January 3, 2017, and did not stop meeting until January 7, 2019. That Joint Resolution—just like every parallel joint resolution at the start of every biennial session for decades—adopts prescheduled floor periods, prescheduled "interim" non-floor periods, and other prescheduled legislative markers, while acknowledging that the Legislature can choose to gather in additional, non-prescheduled floor periods, known as "extraordinary session[s]." The Legislature has used this procedure for decades to address the needs of the people, whenever those needs arise. Because nothing in the Constitution's text or history imposes any limitation on when the Legislature can choose to meet in a floor period, within its biennial session, Plaintiffs' case is meritless and should be dismissed.

Plaintiffs' Amended Complaint should also be dismissed, and its Motion for a Temporary Injunction should be denied, because Plaintiffs fail to plead sufficient harm for standing and fail to establish sufficient irreparable injury and the equities for support injunctive relief. The Amended Complaint asks this Court to take a bulldozer to the many dozens of provisions that the

Legislature enacted in December 2018, but Plaintiffs fail to plead (indeed, do not even mention) *any* injuries attributable to the vast majority of those provisions. And even as to the few provisions that they do discuss, the injuries they allege fail as a matter of law. In their Amended Complaint, Plaintiffs focus on phantom injuries from in-person absentee provisions that are already enjoined by a federal court, voter ID provisions that do nothing more than codify already binding regulations, and provisions that simply reflect the Wisconsin Supreme Court's recent decision eliminating agency deference to interpretations of law. In their Motion for a Temporary Injunction, they repeat much the same claimed injuries, without addressing these alleged harms' legal insufficiency. And, critically, Plaintiffs ignore entirely the havoc that their required injunction would unleash on this State. Their requested injunction would block dozens of laws that the Legislature recently enacted that harm no one, like changes to the tax code to accommodate a recent U.S. Supreme Court decision, additional accommodations for military voters, and an extension of the authority of the Department of Natural Resources for certain flood control projects, to name just a few. Even worse, their theory would call many hundreds of statutory provisions, appointments, and even constitutional amendments that the Legislature has acted upon, over the several decades, into immediate doubt, from the funding of the Milwaukee Bucks arena to the supervision of sex criminals to the constitutional terms of sheriffs and district attorneys.

Some of the laws that the Legislature enacted in December 2018 have generated public debate. Indeed, some portions of those laws implicate separation-of-powers issues of the sort that have led to vigorous public discussion, and those issues are presently being litigated before the Dane County Circuit Court, in *Service Employees International Union (SEIU), et al., v. Robin Vos, et al.,* No. 2019cv302 (Wis. Cir. Ct. 2019). In *SEIU,* the Attorney General recently entered an appearance as a defendant, representing that he will argue that "certain portions" of 2017

Wisconsin Act 369 are unconstitutional, *SEIU*, Dkt. 40; the Attorney General has not made such appearance in this case, under Wis. Stat. § 806.04(11), even though Plaintiffs' theory would necessarily eliminate those same "portions" of 2017 Wisconsin Act 369.[1] With the greatest respect to Plaintiffs, their central theory is unprecedented and without any semblance of merit. The Amended Complaint should be dismissed so that the people of this State can rest assured that the numerous laws, constitutional amendments, and appointments the Legislature has acted favorably upon in non-prescheduled floor periods, over several decades, remain the law of this State.

BACKGROUND[2]

A. Article IV, Section 11 of the Wisconsin Constitution provides the general framework for Legislative sessions in this State. Before the 1968 amendment, Article IV, Section 11 stated that "[t]he legislature shall meet at the seat of government at such time as shall be provided by law, once in two years, and no oftener, unless convened by the governor, in special session . . . ." *State ex rel. Thompson v. Gibson*, 22 Wis. 2d 275, 286, 125 N.W.2d 636 (1964).[3] During this pre-1968 period, the Legislature would meet for its biennial session, recess for extended periods, and then adjourn *sine die*—that is, final adjournment—at some point thereafter. *See State ex rel. Sullivan v. Dammann*, 221 Wis. 551, 559, 267 N.W. 433 (1936) ("When a legislature adjourns *sine die*, it ceases to exist . . . ."). "[I]f anything urgent came up after the final adjournment, the governor could always call a special session." App. 1 at 6. "As recently as 1951, the Legislature met in

[1] It is doubtful whether the Attorney General has the authority to argue that any state statute is unconstitutional, absent explicit statutory authorization, *see State v. City of Oak Creek*, 2000 WI 9, ¶¶ 22-23 & n.14, 232 Wis. 2d 612, 605 N.W.2d 526 (2000), but the current Attorney General has taken the position that he can attack state laws, at least where his office has "substantial interest in the case's outcome," *SEIU*, Dkt. 40, at 2.

[2] For consistency and this Court's convenience, this section is taken directly from the Revised Motion to Intervene, to which this Provision Brief is attached.

[3] As originally enacted, Article IV, Section 11 provided: "The legislature shall meet at the seat of government, at such time as shall be provided by law, once in each year, and no oftener"; in 1881, the people amended Article IV, Section 11, to delete "once in each year" and replace it with "once in two years." *See State ex rel. Hudd v. Timme*, 54 Wis. 318, 333-35, 11 N.W. 785 (1882).

Madison for five months, every other year." *Id.* In 1968, the people adopted an amendment to Article IV, Section 11, providing that the "legislature shall meet at the seat of government at such time as shall be provided by law, unless convened by the governor in special session . . . ." Under this amendment, the Legislature now has flexibility as to how often it will meet during each biennial session. As legislators explained while arguing in its favor, the amendment "give[s] the legislature flexibility in approaching the question of when the legislature should meet." App. 2. Or, as contemporary newspapers reported, under the new amendment "the Legislature will work year-round, with only a summer recess." App. 3. Since 1968, the Legislature has used the flexibility afforded under the 1968 amendment to remain in continuous session throughout the biennial period, adjourning only when the next biennial session begins, while both setting out prescheduled floor periods, prescheduled "interim" non-floor periods and other prescheduled markers, and acknowledging that the Legislature can choose to hold non-prescheduled floor periods, known as "extraordinary session[s]," under law. *See* App. 4-26.

Wisconsin Statute Section 13.02 provides certain requirements under the post-1968 Article IV, Section 11. The relevant provisions for purposes of this litigation are Subsections (1) and (3), with Subsection (3) being the Legislature's implementation of the 1968 amendment to Article IV, Section 11. Subsection (1) provides that "[t]he legislature shall convene [its biennial session] in the capitol on the first Monday of January in each odd-numbered year, at 2 p.m., to take the oath of office, select officers, and do all other things necessary to organize itself for the conduct of its business . . . ." Wis. Stat. § 13.02(1). Subsection (3), in turn, provides that "[e]arly in each biennial session period, the joint committee on legislative organization shall meet and develop a work schedule for the legislative session, which shall include at least one meeting in January of each year, to be submitted to the legislature as a joint resolution." *Id.* § 13.02(3). Put another way,

Section 13.02 explains that the Legislature must meet in a biennial session at the start of each odd-numbered year, and requires that the Joint Committee on Legislative Organization develop, and the Legislature by joint resolution adopt, a work schedule for the biennial period, including (at minimum) "one meeting in January of each year." *Id.* [4]

Beyond this basic framework, however, the Wisconsin Constitution leaves the contours of the Legislature's operations during its biennial session entirely to its discretion. Under Article IV, Section 8, the State Assembly and State Senate each have the constitutional authority to "determine the rules of its own proceedings," and courts have no jurisdiction to interfere with the Legislature's rules and proceedings. *See McDonald v. State*, 80 Wis. 407, 411-12, 50 N.W. 185 (1891); *Goodland v. Zimmerman*, 243 Wis. 459, 468, 10 N.W.2d 180 (1943); *State ex rel. La Follette v. Stitt*, 114 Wis. 2d 358, 364-65, 338 N.W. 2d 684 (1983); *State ex rel. Ozanne v. Fitzgerald*, 2011 WI 43, ¶ 8, 334 Wis. 2d 70, 798 N.W.2d 436.

B. The Legislature recognized its ability to call a non-prescheduled floor period, known as an extraordinary session, in the immediate wake of the 1968 amendment to Article IV, Section 11. It first recognized this authority on February 12, 1971, in the joint resolution adopting the work schedule for the 1971-1972 biennial session. *See* App. 4 at 1. This joint resolution provided for specific floor periods, while also noting that "[a] floor period may be convened at a date earlier than the date specified in this resolution, or an extraordinary session may be called during one of the interim periods, by a majority of the members of each house." *Id.* at 2. Notably, the Legislature adopted this joint resolution one month before it created Subsection (3) of Section 13.02, which

[4] While not directly relevant to the dispute here, Section 13.02 contains two other provisions. Subsection (2) explains that "[t]he regular session of the legislature shall commence at 2 p.m. on the first Tuesday after the 8th day of January in each year unless otherwise provided under" Wis. Stat. § 13.02(3). Subsection (4) provides that "[a]ny measures introduced in the regular annual session of the odd-numbered year which do not receive final action shall carry over to the regular annual session held in the even-numbered year." *Id.* § 13.02(4).

was the first law requiring the Legislature to establish a biennial working schedule under the 1968 amendment to Article IV, Section 11. *See* App. 27. The Legislature adopted similar resolutions in 1973, 1975, and 1977, each pursuant to Subsection 13.02(3), laying out floor periods, committee work periods, and other legislative steps, while also specifically acknowledging its authority to call a non-prescheduled floor period, known as an extraordinary session, during the relevant biennial session. *See* App. 5-7. Then, in 1977, the Legislature amended one of its joint rules—Joint Rule 81(2)—to permit the calling of non-prescheduled floor period "at the direction of a majority of the members of the committee on organization in each house, by the passage of a joint resolution on the approval by a majority of the members elected to each house, or by the joint petition of a majority of the members elected to each house." *See* App. 28 at 32-33. Every biennial resolution since 1977, each adopted pursuant to Subsection 13.02(3) by a majority of members in each house, has set out prescheduled floor periods, prescheduled "interim" non-floor periods, and other prescheduled legislative markers, while noting the authority to call non-prescheduled floor periods during the biennial session, under any of the three mechanisms detailed in Joint Rule 81(2). *See* App. 8-26.

Over the last several decades, the Legislature has repeatedly called these non-prescheduled floor periods, known as extraordinary sessions, consistent with Article IV, Section 11, Section 13.02, and the relevant biennial resolution, to enact laws, confirm appointments, and take necessary steps in the constitutional amendment process. The Legislature did so in January 1980, December 1981, April 1988, May 1988, June 1988, May 1990, April 1992, June 1994, April 1988, May 2000, July 2003, December 2003, March 2004, May 2004, July 2005, April 2006, February 2009, May 2009, June 2009, December 2009, June 2011, July 2011, February 2015, July 2015, November 2015, and March 2018, and has enacted hundreds of laws during these floor periods,

many of which are critical to the people of Wisconsin. In the criminal law realm, enactments during these periods include provisions establishing new laws for bail, creating lifetime supervision for sex offenders, changing driving under the influence laws, and responding to problems with juvenile facilities arising from Lincoln Hills. *See* 1979 Wis. Sess. Laws 805, ch. 112; 1997 Wis. Act 326; 2009 Wis. Act 100; 2017 Wis. Act 185. The Legislature has also taken significant civil and budgetary steps, including appropriating millions of dollars for low-income medical assistance, authorizing and funding the Milwaukee Bucks arena, passing numerous redistricting laws, and enacting laws changing campaign finance provisions and union regulations. *See* 2003 Wis. Act 318; 2015 Wis. Act 60; 1991 Wis. Act 256; 2015 Wis. Act 117; 1981 Wis. Sess. Laws 894, ch. 101. The Legislature has also enacted two recent budget bills using this procedure, appropriating tens of billions of dollars. *See* 2015 Wis. Act 55; 2011 Wis. Act 32. In all, the Legislature has enacted over three hundred laws during these non-prescheduled floor periods. And, underscoring its regularity and utility, the Legislature has even taken necessary steps in the constitutional amendment process using this procedure, such as amendment relating to the length of terms of sheriffs and district attorneys. *See* Assemb. J. Res. 43, 1997-98 Legis.

C. At issue here is the 2017-2018 biennial session, which the Legislature conducted consistent with Article IV, Section 11, Section 13.02, and historical practice. Just as with every biennial resolution since 1977, the joint resolution adopting a work schedule for the 2017-2018 biennial session sets out prescheduled floor periods, prescheduled "interim" non-floor periods, and other prescheduled legislative markers. *See* App. 29 at 1-3. As the joint resolution explains, the 2017-2018 biennial session begins "on Tuesday, January 3, 2017," and "ends at noon on Monday, January 7, 2019." *Id.* at 1. And, of course, the biennial joint resolution specifically provides that the Legislature has the authority to "convene an extraordinary session . . . as permitted by joint

rule 81," while also noting the possibility of an extraordinary session in several other provisions. *Id.* at 1-3. The resolution was adopted unanimously in the Senate by a 33-0 rollcall vote and in the Assembly by voice vote.

As contemplated by 2017 Enrolled Session Resolution 1, the Legislature in December 2018 convened in extraordinary session—as part of the 2017-2018 biennial session—and enacted three bills, which the Governor ultimately signed, as well as confirmed eighty-two gubernatorial nominees. Below, the Legislature groups most of the provisions the Legislature enacted into several categories.[5]

Tax Law Changes. Sections 1-16 and 20-21(1) of 2017 Wisconsin Act 368 and Sections 84e-85r of 2017 Wisconsin Act 369 make tax law changes and alternations to nexus thresholds relating to out-of-state retailers' sales in response to *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018); make adjustments to the taxation of partnerships, limited liability corporations and S corporations; and eliminate certain verification requirements for tax credit recipients.

Transportation Project Provisions. Sections 17-18 and 21(2) of 2017 Wisconsin Act 368 make changes to the use of federal funds in state highway projects, including requiring that such projects are paid with at least 70% aggregate federal dollars; mandate notice to political subdivisions of federally funded highway projects; and limit the Department of Transportation's authority to transfer certain federal and state funds.

Changes to Certain Voting Provisions. Sections 1, 1B, 1C, 1D, 1E, 1F, 1FG, 1FM, 1G, 1GC, 1GD, 1GF, 1H, 1I, 1J, 1JB, 1JS, 1K, 1L, 1M, 1MG, 1MP, 1MQ, 1MS, 1MT, 1MV, 1N, 1NG, and 91-95 of 2017 Wisconsin Act 369 enact certain provisions related to Wisconsin's voter ID law; codify

[5] This list is not intended to be exhaustive and a more complete description of these laws, as explicated by the non-partisan Legislative Fiscal Bureau, can be found at http://docs.legis.wisconsin.gov/misc/lfb/bill_summaries/2017_19/0002_december_2018_extraordinary_session_bills_as_passed_by_the_legislature_12_6_18.pdf.

preexisting Department of Transportation regulations; expand the statutory window for in-person absentee voting; and loosen regulations for military and oversee electors by giving those voters more options, bringing Wisconsin into compliance with the federal Uniformed and Overseas Citizens Absentee Voting Act, as codified in 52 U.S.C. §§ 20301-20311.

Provisions Relating to the Conduct of State Litigation. Sections 3, 5, 7-8, 26-30, and 97-103 of 2017 Wisconsin Act 369 prohibit the Attorney General from settling away the constitutionality or other basis of validity of a state statute, unless the Attorney General obtains consent from the Legislature, as intervenor, or, if the Legislature has not intervened, without approval from the Joint Committee on Finance; place other restrictions on the Attorney General's authority to settle away or withdraw from litigation; limit the Attorney General's authority over settlement funds; eliminate the Solicitor General Office; and permit the Legislature to intervene in cases where the constitutionality or other basis of validity of a state statute is being challenged at any time, to retain counsel other than the Wisconsin Department of Justice for such intervention, and to receive notice when a lawsuit challenging a statute's constitutionality is filed.

Guidance Documents Provisions. Sections 31, 38, 65-71 and 96 of 2017 Wisconsin Act 369 regulate the issuance of guidance documents, including requiring a 21-day notice-and-comment period for new documents, requiring all extant guidance documents to go through notice-and-comment by July 1, 2019, and permitting litigants to challenge guidance documents in court.

Legislative Oversight Provisions. Sections 16, 39, 64, and 87 of 2017 Wisconsin Act 369 and Sections 11-13 of 2017 Wisconsin Act 370 create or modify joint legislative committees' authority, consistent with *Martinez v. DILHR*, 165 Wis. 2d 687, 701, 478 N.W.2d 582 (1992), to oversee: changes to Capitol security, the issuance of new administrative rules, the designation of new enterprise zones, the appointment of new advisory committee members, the relocation of

certain workforce development funds, and the making of certain requests related to Medicaid. In addition, Sections 18, 23 and 90 of 2017 Wisconsin Act 369 require the Department of Administration to submit an annual report to the Joint Committee on Finance and the Legislature on the State's information technology and communication services self-funded portal; require the Department of Veterans Affairs to notify the Joint Committee on Finance of the transfer of state veterans funds to the veterans trust fund or the or the veterans mortgage loan repayment fund; and require the Department of Corrections, upon request of the Legislature, to prepare a report regarding pardoned or otherwise early released prisoners. And Section 10 of 2017 Wisconsin Act 370 requires, among other things, permission of the Legislature before the Department of Health Services can seek "a waiver or a renewal, modification, withdrawal, suspension, or termination of a waiver of federal law or rules or for authorization to implement a pilot program or demonstration project."

Prohibition on Agency Interpretive Authority: Sections 35 and 80 of 2017 Wisconsin Act 369 codify the Wisconsin Supreme Court's holding in *Tetra Tech EC, Inc. v. Wisconsin Department of Revenue*, 2018 WI 75, 382 Wis. 2d 496, 914 N.W.2d 21, which eliminated deference for agency interpretations of law.

Miscellaneous Agency-Related Provisions. Sections 20-21, 37 and 85 of 2017 Wisconsin Act 369 allocate certain moneys received by the Department of Justice; provide that agencies cannot rely upon federally submitted plans or settlement agreements as an authority to promulgate new rules; extend the authority of the Department of Natural Resources relating to certain flood control projects; and modify certain appointment procedures.

Prohibition on Certain Re-Nominations. Section 4 of 2017 Wisconsin Act 369 prohibits the Governor or another state officer or agency from re-nominating particular individuals that the Senate has already refused to confirm to the same office or position.

Codification of Certain Federally-Approved Plans. Sections 14-17 and 38-43 of 2017 Wisconsin Act 370 codify into state law federal waivers for programs for childless adults that were recently approved by the United States Department of Health and Human Services and provide for the implementation of the State's reinsurance program for health carriers recently passed in 2017 Wisconsin Act 138, in accordance with the terms and conditions of the Department of Health and Human Services' approval on July 29, 2018. Additionally, Section 17 codifies reforms aimed at strengthening drug screening, testing, and treatment regulations for able-bodied adults participating in certain public assistance programs as federally approved by the Centers for Medicare and Medicaid Services on October 31, 2018.

Codification of Unemployment Insurance Job Search Regulations. Sections 27-38 of 2017 Wisconsin Act 370 codify into state law Department of Public Works administrative regulations concerning job search requirements necessary to receive unemployment, while also enumerating various exceptions to these requirements.

Directing Appropriations to Workforce Training Programs. Sections 1-9, 18-26, 44(1), and 45 of 2017 Wisconsin Act 370 appropriate separate moneys to various workforce training programs instead of the prior combined appropriations.

Confirmation of eighty-two appointees. The Legislature also confirmed numerous appointments to various state agencies and state boards. *See* https://docs.legis.wisconsin.gov/2017/related/journals/senate/20181204ede8.pdf.

D. On January 10, 2019, almost four weeks after the Governor signed the bills enacted during the December 2018 extraordinary session, Plaintiffs brought this lawsuit against the Governor and the members of the Wisconsin Election Commission (as well as the Elections Commission Administrator), arguing that the Legislature "lacked legal authority to convene the December 2018 Extraordinary Session," pursuant to Article IV, Section 11 of the Wisconsin Constitution, and that, therefore, all of the laws enacted and appointments confirmed during that session were "*ultra vires*, and, therefore, unenforceable." *See* Amended Complaint at 4 ("Compl."). A couple of days later, Plaintiffs filed their Amended Complaint, based upon the same theory, Compl. ¶¶ 19-21, 81-85, seeking invalidation of all the provisions that the Legislature enacted in December 2018, while alleging harms to themselves from only to a small handful of those provisions, Compl. ¶¶ 51-77.[6] Then, in their Motion for a Temporary Injunction, Plaintiffs repeated the same meritless theory of constitutional violation, *see* TI Mot. 8-13, and then asked for a temporary injunction blocking every provision enacted, and every appointment confirmed, in December 2018, while largely discussing much the same limited universe of alleged harms noted in their Amended Complaint, *see* TI Mot. 20-38.

ARGUMENT

I. This Court Should Dismiss The Amended Complaint Because Plaintiffs Fail To State A Claim As A Matter Of Law

Pursuant to Wis. Stat. § 802.06, a defendant has the right to seek dismissal of a complaint, including for failure to state a claim, for lack of jurisdiction, and for failure to join an indispensable party. *Id.* § 802.06(2)(a)(2), (6), (7). "A motion to dismiss for failure to state a claim tests the

[6] While the Amended Complaint claims that this lawsuit is venued in this Court under Wis. Stat. § 801.50(2)(a), Compl. ¶ 16, the proper venue provision is Wis. Stat. § 801.50(3) because the "only" defendants in this case are "state officer[s]." Nevertheless, venue in this Court is now proper because, by filing their complaint in this Court, Plaintiffs "designated" Dane County Circuit Court as the venue. *State ex rel. Dep't of Nat. Res. v. Ct. App.*, 2018 WI 25, ¶ 31, 380 Wis. 2d 354, 909 N.W.2d 114.

legal sufficiency of the complaint." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693 (citation omitted). To survive such a motion, "a complaint must plead facts, which if true, would entitle the plaintiff to relief." *Id.* ¶ 21. If a plaintiff's claim fails as a matter of substantive law, after assuming all of the facts pleaded in the complaint as true, the defendant is entitled to dismissal. *Id.* ¶ 31. A plaintiff challenging a statute as unconstitutional faces a difficult burden, having to "prove that the statute is unconstitutional beyond a reasonable doubt," with "[a]ny doubt" being "resolved in favor of upholding the statute." *Martinez*, 165 Wis. 2d at 695. To survive a motion to dismiss for lack of standing, a plaintiff must allege "'a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.'" *State ex rel. First Nat'l Bank v. M & I Peoples Bank*, 95 Wis. 2d 303, 307-08, 290 N.W.2d 321 (1980) (citation omitted). And a complaint must be dismissed if a necessary party cannot be joined and the case cannot "in equity and good conscience" proceed without that party. *See* Wis. Stat. § 803.03(3); *Dairyland Greyhound Park, Inc. v. McCallum*, 2002 WI App 259, ¶ 9, 258 Wis.2d 210, 655 N.W.2d 474.

A. Plaintiffs' Claim Fails As A Matter Of Law Because The Legislature Was Meeting "At Such Time As . . . Provided By" Law In December 2018

Plaintiffs' core argument in this case is that the Legislature violated the Wisconsin Constitution by enacting laws and confirming appointments during its December 2018 floor period. This argument is completely meritless, meaning that the Amended Complaint should be dismissed entirely.

A. When a court seeks to determine whether certain actions violate the Wisconsin Constitution, it must look to three categories of sources. *See State v. Williams*, 2012 WI 59, ¶ 15, 341 Wis. 2d 191, 814 N.W.2d 460. Most importantly, the court should consider "the 'plain meaning of the words [of the Constitution] in the context used.'" *Id.* (citation omitted). Second, the court should

examine "the 'historical analysis of the constitutional debates' relative to the constitutional provision under review; the prevailing practices [ ] when the provision was adopted; and the earliest legislative interpretations of the provision as manifested in the first laws passed that bear on the provision." *Id.* (citation omitted). Lastly, the court should "seek to ascertain what the people understood the purpose of the amendment to be." *Id.*

Plaintiffs' core submission in this case—that the Legislature violated Article IV, Section 11 of the Wisconsin Constitution by holding a floor period in December 2018—finds no support in the Constitution's "plain" text. *Id.* Article IV, Section 11, as amended in 1968, provides that "[t]he legislature shall meet at the seat of government at such time as shall be provided by law, unless convened by the governor in special session . . . ." Wis. Const. art. IV, § 11. Given that the Governor did not convene any special session relevant to this dispute, the *only* constitutional question is whether, in December 2018, the Legislature was "meet[ing] . . . *at such time as shall be provided by law.*" *Id.* (emphasis added).

The Legislature was meeting as "provided by law" in December 2018. *Id.* Under Wisconsin Statute Subsection 13.02(1), "[t]he legislature shall convene" its biennial session "in the capitol on the first Monday of January in each odd-numbered year," and under Subsection 13.02(3), "[e]arly in each biennial session period, the joint committee on legislative organization shall meet and develop a work schedule for the legislative session, which shall include at least one meeting in January of each year, to be submitted to the legislature as a joint resolution." Wis. Stat. § 13.02(1), (3). As the Legislature provided in 2017 Enrolled Session Resolution 1, which the Legislature adopted in compliance with Subsection 13.02(3), that "the 2017 Wisconsin legislature began on Tuesday, January 3, 2017, and . . . the biennial session period ends at noon on Monday, January 7, 2019." App. 29 at 1. And, in fact, the Legislature did so meet throughout this period,

not adjourning *sine die*—that is, ending its 2017-2018 biennial session—until "Monday, January 7, 2019." *Id.* The period that 2017 Enrolled Session Resolution 1 spelled out—January 3, 2017, through January 7, 2019—is the Legislature "meet[ing] at the seat of government at such time as shall be provided by law," Wis. Const. art. IV, § 11, and December 2018 falls within that period. The Constitution's plain text requires no more.

Although the Legislature being in biennial session throughout December 2018 is enough, standing alone, to ensure that the Legislature complied fully with the plain text of Article IV, Section 11, the Legislature did even more to make clear that it had authority to hold a floor period in December 2018. In 2017 Enrolled Session Resolution 1, the Legislature articulated certain prescheduled floor periods, prescheduled "interim" non-floor periods, and other prescheduled legislative markers, while noting that the Legislature has the authority to "convene an extraordinary session . . . as permitted by joint rule 81." App. 29 at 1. The Legislature invoked this provision twice during the 2017-2018 biennial session to hold non-prescheduled floor periods; once in March 2018—to deal with the issues arising from the impending closure of the Lincoln Hills juvenile facility, *see* 2017 Wis. Act 185—and once in December 2018, to take the actions in dispute here.

The remaining considerations that the Wisconsin Supreme Court has articulated for understanding the meaning of the Wisconsin Constitution—prevailing practices at the time of the amendment's adoption, early legislative interpretations, and the people's understanding of the amendment, *Williams*, 2012 WI 59, ¶ 15—all strongly support the constitutionality of the Legislature's actions. Before the people adopted the 1968 amendment to Article IV, Section 11, that Section provided that "[t]he legislature shall meet at the seat of government at such time as shall be provided by law, once in two years, and no oftener, unless convened by the governor, in

special session . . . ." Wis. Const. art. IV, § 11 (1967); *see Thompson*, 22 Wis. 2d at 286. During this pre-1968 period, the Legislature would meet for a couple of months a year and eventually would adjourn *sine die*. *See supra*, at 3-4. As contemporary sources explained, the amendment to Article IV, Section 11 was intended to "give[] the legislature flexibility in approaching the question of when the legislature should meet," App. 2, with the expectation that "the Legislature will work year-round, with only a summer recess," App. 3. Legislative practice following the 1968 amendment confirms that the Legislature quickly adopted the approach that the Legislature eventually used during the 2017-2018 biennial session: hold a single, continuous biennial session, while setting out prescheduled floor periods, prescheduled "interim" non-floor periods, and other prescheduled legislative markers, and allowing itself to convene in non-prescheduled floor periods, known as extraordinary sessions. *See, e.g.*, App. 4-26. The Legislature first recognized its authority to sit in non-prescheduled floor periods in February 12, 1971, when it adopted the work schedule for the 1971-1972 biennial session, just a month before the Legislature created Subsection 13.02(3), which is the legislation implementing the 1968 amendment to Article IV, Section 11. *See* App. 4 at 2, 27. In every biennial resolution since, the Legislature has set out pre-scheduled floor periods, while recognizing that it may come in for non-prescheduled floor periods, known as extraordinary sessions. *See* App. 5-26. And the Legislature has held over two dozen extraordinary sessions since 1980. *See supra*, at 6-7.

B. In their Amended Complaint and Motion for a Temporary Injunction, Plaintiffs make several arguments to support their position that the Constitution prohibits the Legislature from meeting in extraordinary session, but those all arguments fail. Most telling, in their entire Amended Complaint, Plaintiffs do not even mention—let alone grapple with—2017 Enrolled Session Resolution 1, the joint resolution that defeats their case; and when they finally acknowledge 2017

Enrolled Session Resolution's existence, in one paragraph on page 17 of their Motion for a Temporary Injunction, Plaintiffs both ignore the central aspect of the Resolution and then take a position on that Resolution that reduces their theory to incoherence.

Plaintiffs argue that because Article IV, Section 11 only permits the Legislature to meet as "provided by law" and because the Legislature did not enact a law scheduling the December 2018 floor period, the Legislature had no authority to enact laws or confirm appointments in December 2018. Compl. ¶¶ 17-21, 81-85; TI Mot. 8-13. Plaintiffs' argument fails because Plaintiffs misunderstand the relationship between Article IV, Section 11, Subsection 13.02(3) and 2017 Enrolled Session Resolution 1. To repeat, under Article IV, Section 11, the "legislature shall meet at the seat of government at such time as shall be provided by law." Wis. Const. art. IV, § 11. That "law," in turn, includes Subsection 13.02(3), which provides that "[e]arly in each biennial session period, the joint committee on legislative organization shall meet and develop a work schedule for the legislative session, which shall include at least one meeting in January of each year, to be submitted to the legislature as a joint resolution." Wis. Stat. § 13.02(3). 2017 Enrolled Session Resolution 1 is the "joint resolution" that Subsection 13.02(3) calls for and provides that "the 2017 Wisconsin legislature began on Tuesday, January 3, 2017, and . . . the biennial session period ends at noon on Monday, January 7, 2019." App. 29 at 1. Because the December 2018 floor period took place between January 3, 2017, and January 7, 2019, the Legislature was in full compliance with Article IV, Section 11. And if that is not enough, 2017 Enrolled Session Resolution 1 specifically recognizes the authority of the Legislature to call non-prescheduled floor periods, known as "extraordinary sessions." *Id.* This simple path from Article IV, Section 11 to Subsection 13.02(3) to 2017 Enrolled Session Resolution 1—a path that the Legislature has followed for decades after the 1968 amendment to Article IV, Section 11—defeats entirely Plaintiffs' lawsuit.

Plaintiffs do not even mention 2017 Enrolled Session Resolution 1 in their Amended Complaint and relegate it to a brief, 1-paragraph discussion in their Motion for a Temporary Injunction. TI Mot. 17. In that paragraph, they ignore the key provision that "the 2017 Wisconsin legislature began on Tuesday, January 3, 2017, and . . . the biennial session period ends at noon on Monday, January 7, 2019." App. 29 at 1. Plaintiffs, of course, have no answer to this provision, which ends their case by demonstrating that the Legislature was "meet[ing] at the seat of government at such time as shall be provided by law" throughout this entire period, including in December 2018. Wis. Const. art. IV, § 11. The Legislature no longer adjourns *sin dine* when it finishes its anticipated business, and now meets continuously through the biennial period, pursuant to the joint resolution that it adopts at the start of the session. That joint resolution, in turn, has always included prescheduled floor periods, various non-floor periods, and, at the Legislature's option, non-prescheduled floor periods, known as extraordinary sessions. *See supra*, at 4-6.

Plaintiffs' abbreviated attempt to deal with 2017 Enrolled Session Resolution 1 also demonstrates the incoherence of their theory. *See* TI Mot. 17. Their primary submission is that the Legislature must adopt a "law" in order to meet in a floor session. *See* Compl. ¶¶ 17-21, 81-85; TI Mot. 8-13. Yet, as Plaintiffs themselves concede elsewhere in their brief, joint resolutions are not a law signed by the Governor. *See* TI Mot. 10 ("A legislative enactment must satisfy each and every step of this process to become law. A joint resolution does not conform to these requirements and, therefore, is *not* law."). If Plaintiffs took their own core argument seriously, they would need to take the position that *all* laws that the Legislature has adopted since at least 1971 have been "*ultra vires*" because the biennial joint resolutions scheduling floor periods are not "law," and the Legislature has not enacted any other law specifically authorizing *any* of its floor periods, whether prescheduled in mere joint resolutions or non-prescheduled extraordinary

sessions. Plaintiffs appear unwilling to take their theory to its logical conclusion, however, so they are left to argue the incoherent provision that 2017 Enrolled Session Resolution 1 (and every other biennial joint resolution for decades) was valid to the extent that it authorized prescheduled floor periods, but invalid to the extent that it authorized non-preschedule floor periods. TI Mot. 17. That distinction not only lacks any grounding in the Constitution, any statute, or logic, but is inconsistent with Plaintiffs' core theory.

Plaintiffs' repeated invocation of the fact that the Legislature acted pursuant to Joint Rule 81 in calling its December 2018 floor period, Compl. ¶¶ 17-21, 81-85; TI Mot. 9-12, 16-17, is a legally irrelevant distraction. Again, Article IV, Section 11 authorizes the Legislature to meet "as provided by law." That law includes Subsection 13.02(3), and Subsection 13.02(3) authorizes 2017 Enrolled Session Resolution 1, which then invokes Joint Rule 81. Article IV, Section 11 and Subsection 13.02(3) are agnostic as to how the Legislature schedules its business throughout the biennial session: the Legislature could preschedule all of its floor periods through a joint resolution at the start of the biennial session; it could preschedule some sessions in that joint resolution, while permitting additional floor periods by subsequent joint resolutions; or, as has been uniform historical practice for decades, it could preschedule some floor periods through a joint resolution, while providing in that same joint resolution that members of the committee on organization in each house can call additional floor periods later in the session, under internal legislative procedures.[7] Accordingly, Plaintiffs' quibble with the Legislature's decision in 2017 Enrolled Session Resolution 1 (and every joint resolution for decades) that non-prescheduled period could

[7] The only limitation on the Legislature's discretion here is found in Subsections 13.02(1), which requires that "[t]he legislature shall convene in the capitol on the first Monday of January in each odd-numbered year, at 2 p.m., to take the oath of office, select officers, and do all other things necessary to organize itself for the conduct of its business, but if the first Monday of January falls on January 1 or 2, the actions here required shall be taken on January 3," and Subsection 13.02(2), which requires "[t]he regular session of the legislature shall commence at 2 p.m. on the first Tuesday after the 8th day of January in each year unless otherwise provided under" Subsection 13.02(3).

be called "at the direction of a majority of the members of the committee on organization in each house," under Joint Rule 81, is both non-reviewable attack on the Legislature's internal operating procedures, *see McDonald*, 80 Wis. at 411-12; *Goodland*, 243 Wis. at 468; *State ex rel. La Follette*, 114 Wis. 2d at 364-65; *State ex rel. Ozanne*, 2011 WI 43, ¶ 8, and is, in any event, without any constitutional or statutory support. Simply put, because the Legislature was meeting as "provided by law" until Monday, January 7, 2019, Wis. Const. art. IV, § 11, the Constitution has nothing to say about what internal procedural mechanisms the Legislature used in deciding when to hold its non-prescheduled floor periods.

For much the same reasons, Plaintiffs citation to Article IV, Section 7's quorum requirement, Compl. ¶¶ 25, 81-85; TI Mot. 11, depends entirely upon their meritless Article IV, Section 11 argument. Since the Legislature was meeting according to law in December 2018, pursuant to Subsection 13.02(3) and 2017 Enrolled Session Resolution 1, Plaintiffs' invocation of the quorum requirement becomes entirely irrelevant. After all, Plaintiffs do not argue that the Legislature violated the quorum requirement when it enacted Subsection 13.02(3) and adopted 2017 Enrolled Session Resolution 1.

Plaintiffs invocation of constitutional debates and early legislative practices, TI Mot. 16-17, only further undermine their position. As Plaintiffs' own source—the report by the Legislative Reference Bureau—explains, the 1968 amendment to Article IV, Section 11 was written so that the "biennial Legislature would organize its session into a number of 'work periods,'" and then discusses one possible proposal for the work periods for 1967-1968 session. *See* Constitutional Amendments to be Submitted to the Wisconsin Electorate, LRB-WB-68-1, at 9 (Mar. 1968). This report also makes clear that it would be up to the Legislature to determine how to organize these "work periods," *id.*, which was consistent with the extant caselaw that made clear that the

Legislature's internal procedures were committed entirely to that body's discretion. *See McDonald*, 80 Wis. at 411-12; *Goodland*, 243 Wis. at 468. The Legislature's implementation of legislation for this new flexibility was Subsection 13.02(3), which the Legislature enacted in 1971. *Supra*, at 5. Contemporaneously with that enactment, the Legislature also adopted a joint resolution that had prescheduled regular floor periods, while specifically recognizing its authority to call non-prescheduled periods, known as extraordinary sessions. *See supra*, at 5-6. Notably, nothing in Plaintiffs' historical discussion suggests that anyone at the time or in the years thereafter—whether legislator, public official, or scholar—considered this to be unconstitutional.

Finally, Plaintiffs' attempt to invoke the practices of other States, TI Mot.18-19, inadvertently contradicts their argument. As the bipartisan National Conference of State Legislatures explains in a summary of state legislative sessions around the country, different States have different times when they adjourn, with most States adjourning at some point during the year. *See* 2018 Legislative Session Calendar (Sep. 19, 2018), *available at* http://www.ncsl.org/Portals/1/Documents/NCSL/2018_Session_Calendar_091918.pdf. As the National Conference of State Legislatures correctly points out, however, Wisconsin is one of the minority of States that has no date for adjournment, as the "Legislature meets throughout the year." *Id.* As explained above, it is precisely because the Wisconsin Legislature meets continuously that its December 2018 floor period, which took place *during* the continuous meeting of the 2017-2018 biennial session, complied with Article IV, Section 11.

B. Plaintiffs Failed To Plead Sufficient Facts To Establish Standing, Including Pleading Absolutely No Alleged Harms From Most Of The Provisions That They Challenge

To survive a motion to dismiss for lack of standing, a plaintiff must "allege" "a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.'" *First Nat'l Bank*, 95 Wis. 2d at 307-08 (citation omitted); *accord Foley-Ciccantelli v. Bishop's*

Grove Condo Ass'n, Inc., 2011 WI 36, ¶¶ 47-48, 333 Wis. 2d 402, 797 N.W.2d 789. Where, as in this case, a plaintiff brings a constitutional challenge to a statutory provision, "the standing question is twofold: whether 'the plaintiff [it]self has suffered "some threatened or actual injury resulting from the putatively illegal action," and whether "the constitutional . . . provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *First Nat'l Bank*, 95 Wis. 2d at 308 (citations omitted); *see also Bright v. City of Superior*, 163 Wis. 1, 17-18, 156 N.W. 600, 606 (1916) (defining the kind of injury sufficient to provide standing generally). An alleged injury cannot be "speculative," *Cornwell Personnel Assocs. v. Dep't of Indus., Labor & Human Relations*, 92 Wis. 2d 53, 62, 284 N.W.2d 706 (Ct. App. 1979), such as when the alleged harms depend upon conjecture about the possible actions of "third parties," *Allen v. Wright*, 468 U.S. 737, 759 (1984). Where a plaintiff is challenging multiple provisions, that plaintiff must allege facts to establish standing for every provision that the plaintiff seeks to invalidate because "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996); *accord Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017).

Plaintiffs ask this Court to strike down the dozens of provisions that the Legislature enacted in December 2018, but Plaintiffs have not even attempted to allege "threatened or actual injury" from the vast majority of these. In particular, Plaintiffs allege no harms from the changes to Wisconsin's tax laws (Section 1-16 and 20-21(1) of 2017 Wisconsin Act 368, and Sections 84e-85r of 2017 Wisconsin Act 369); several of the transportation project provisions (Sections 18 and 21(2) of 2017 Wisconsin Act 368); the vast majority of the changes to certain voting provisions (Sections 1, 1B, 1C, 1D, 1E, 1F, 1FG, 1FM, 1G, 1GC, 1GD, 1GF, 1H, 1I, 1J, 1JB, 1JS, 1L, 1M, 1MG, 1MP, 1MQ, 1MS, 1MT, 1MV, 1N, and 1NG of 2017 Wisconsin Act 369); some of the provisions relating to the conduct of State litigation (Sections 3, 26, and 97-103 of 2017 Wisconsin Act 369); the

judicial review aspect of the guidance document provisions (Sections 31, 65-71, and 96 of 2017 Wisconsin Act 369); several of the legislative oversight provisions (Sections 16, 18, 23, 39, 64, 87, and 90 of 2017 Wisconsin Act 369 and Sections 11-12 of 2017 Wisconsin Act 370); several of the miscellaneous agency-related provisions (Sections 20-21, 37, and 85 of 2017 Wisconsin Act 369); the prohibition on certain re-nominations (Section 4 of 2017 Wisconsin Act 369); the codification of at least some federally-approved plans (Sections 14-16 and 38-43 of 2017 Wisconsin Act 370), the codification of unemployment insurance regulations (Sections 27-38 of 2017 Wisconsin Act 370); or the provisions directing appropriations to workforce training programs (Sections 1-9, 18-26, 44(1), and 45 of 2017 Wisconsin Act 370). Plaintiffs' boilerplate claims of harm from "all" of the laws that the Legislature enacted in December 2018 because, in their view, the Legislature acted unconstitutionally, Compl. ¶¶ 54, 76, is legally insufficient to establish standing: "[The court's] function is unquestionably to prevent a substantial wrong to the citizen, not to use its high powers to prevent an act which merely infringes upon an abstract or theoretical right but causes no substantial injury to any one." *Bright*, 163 Wis. at 18.

Even where Plaintiffs allege that certain provisions cause them specific harm, those allegations often fail as a matter of law:

Plaintiffs claim injury from Section 1K of 2017 Wisconsin Act 369, which makes certain changes in Wisconsin's in-person absentee voting regime. *See* Compl. ¶¶ 52, 71-75. That provision makes the following change to the time for in-person absentee voting, in Wisconsin Statutes Subsection 6.86(1): "[T]he application shall be made no earlier than ~~the opening of business on the 3rd Monday~~ 14 days preceding the election and no later than ~~7 p.m. on~~ the ~~Friday~~ Sunday preceding the election. ~~No application may be received on a legal holiday. An application made in person may only be received Monday to Friday between the hours of 8 a.m. and 7 p.m.~~

~~each day~~." As a matter of state law, this change *increases* the availability of in-person absentee voting—to now allow for evening and weekend in-person absentee voting—which Plaintiffs do not (and could not possibly) allege would harm them in any way. What Plaintiffs appear to be complaining about is that the U.S. District Court for the Western District of Wisconsin enjoined the pre-December 2018 version of Subsection 6.86(1) on July 29, 2016, thereby re-imposing the prior regime of up to six weeks of in-person absentee voting, in an order that is pending on appeal before the Seventh Circuit. *See* Findings of Fact and Conclusions of Law, *One Wis. Inst. Inc., et al. v. Thomsen, et al.*, No. 15-cv-324 (W.D. Wis. July 29, 2016), ECF No. 234; Notice of Appeal, *One Wis. Inst. Inc., et al. v. Thomsen, et al.*, No. 15-cv-324 (W.D. Wis. Aug 2, 2016), ECF No. 236. But if Plaintiffs are looking to the actions of the Western District to inform their alleged harms, then they must take account of the Western District's recent order on January 17, 2019, enjoining Section 1K of 2017 Wisconsin Act 369 as violating the July 29, 2016 injunction. Order, *One Wis. Inst. Inc., et al. v. Thomsen, et al.*, No. 15-cv-324 (W.D. Wis. Jan. 16, 2019), ECF No. 338. Thus, as a matter of state law, Section 1K expands rights for voters, and as a matter of federal injunctions overlaid on state law, Section 1K has no impact on voters or anyone else.

Plaintiff claim injury from Sections 91-95 of 2017 Wisconsin Act 369, which codify the voter ID procedures that the Wisconsin Department of Transportation adopted as a final, binding rule in Wis. Admin. Code § Trans. 102.15. *See* Compl. ¶ 53. Plaintiffs do not purport to explain how they suffer injury from the codification of previously binding regulations, which merely wrote the latter mandatory commands into equally binding statutes.

Plaintiffs claim that they will suffer from Sections 14-17 of 2017 Wisconsin Act 369, which codify a federal waiver for programs for childless adults that was recently approved by the United States Department of Health and Human Services. *See* Compl. ¶¶ 56-57. Plaintiffs do not explain

how they will be harmed by this provision over and above the status quo, given that the United States Department of Health and Human Services has already approved this program.

Plaintiffs allege that they suffer harm from Sections 10 and 13 of 2017 Wisconsin Act 370, which, among other provisions, provide that the Legislature must authorize the Wisconsin Department of Health Services seeking any "waiver or a renewal, modification, withdrawal, suspension, or termination of a waiver of federal law or rules or for authorization to implement a pilot program or demonstration project" from the Federal Government, and require the Wisconsin Department of Health Services to submit any proposed Medical Assistance plan amendments to the Joint Committee on Finance. *See* Compl. ¶¶ 55, 58. These claimed injuries are too "speculative" to establish standing, *Cornwell Personnel Assocs.*, 92 Wis. 2d at 62, most glaringly because they rely entirely upon conjecture of what Wisconsin Department of Health Services, a "third part[y]," *Allen*, 468 U.S. at 759, will seek to do in the future. Not only is it speculative that the Department will seek federal approval to waive any federal law or propose any changes to Wisconsin's Medical Assistance plan, but it is also speculative as to what the content of that approval/amendments would be, and whether those would harm any of Plaintiffs in any way.

Plaintiffs allege harm flowing from Sections 35 and 80 of 2017 Wisconsin Act 369, which prohibit deference to an agency's conclusion of law. *See* Compl. ¶ 62. But these Sections merely codified the Wisconsin Supreme Court's decision in *Tetra Tech*, 2018 WI 75, meaning that they impose no possible injury. *See id.* ¶ 3 (lead op.) ("[w]e have also decided to end our practice of deferring to administrative agencies' conclusions of law'); *accord id.* ¶ 135 (Ziegler, J., concurring); *id.* ¶ 159 (Gableman, J., concurring).

Nor does Plaintiffs' invocation of taxpayer standing salvage the Amended Complaint. "In order to maintain a taxpayers' action, it must be alleged that the complaining taxpayer and

taxpayers as a class have sustained, or will sustain, some pecuniary loss; otherwise the action [can] only be brought by a public officer." *Hart v. Ament*, 176 Wis. 2d 694, 699, 500 N.W.2d 312 (1993) (alteration in original) (quoting *S.D. Realty Co. v. Sewearage Comm.*, 15 Wis. 2d 15, 21-22, 112 N.W.2d 177 (1961)). While the pecuniary harm need not be large, Plaintiffs still must allege the unlawful expenditure of taxpayer monies. *See Thompson v. Kenosha Cty.*, 64 Wis. 2d 673, 679-80, 221 N.W.2d 845 (1974). Plaintiffs purport to establish taxpayer standing in bulk, Compl. ¶¶ 70, 76, but it is their burden to allege harm from every provision that they challenge, *see supra*, at 22, and they have not alleged how the vast majority of the provisions they seek to invalidate cause any loss of taxpayer funds.

Indeed, even as to the few provisions that Plaintiffs claim will cost money, their allegations often fail as a matter of law. For instance, Plaintiffs claim that Sections 35 and 80 of 2017 Wisconsin Act 369, which prohibit deference to an agency's conclusion of law, will cost taxpayers money. But because these provisions merely codify *Tetra Tech*, they are costless. And Plaintiffs allege that taxpayers will be harmed by Section 27 of 2017 Wisconsin Act 369, which changes the location where settlement funds are deposited. Compl. ¶ 67. But Plaintiffs fail to explain why uniformly putting settlement funds into the general fund—instead of allowing certain discretion to the Attorney General in the expenditure of those funds subject, in select cases, to approval by the Joint Committee of Finance—will cost taxpayers any money.

Finally, as a more general matter, Plaintiffs do not allege, or make any arguments explaining, how the "constitutional . . . provision" at issue in this case—Article IV, Sections 7 and 11—"can be understood as granting persons in the plaintiff's position a right to judicial relief." *First Nat'l Bank*, 95 Wis. 2d at 307-08. Those provisions set out the requirements for a legislative quorum and the requirements for when the Legislature sits. Absent more specific allegations or

argumentation on this element standing, Plaintiffs lack standing to challenge any of the provisions or appointments, on the basis of these constitutional provisions.

C. Plaintiffs Failed To Join The Legislature, Which Is An Indispensable Party

Unless this Court joins the Legislature as a party, the Amended Complaint must be dismissed because the Legislature is both a necessary and an indispensable party to this action. "The inquiry of whether a movant is a necessary party under § 803.03(1)(b)1"—the requirement that a person must be joined where disposition of the action in the person's absence may impair the person's ability to protect that interest—"is in all significant respects the same inquiry under Wis. Stat. § 803.09(1) as to whether a movant is entitled to intervene in an action as a matter of right." *Helgeland v. Wis. Municipalities*, 2008 WI 9, ¶¶ 131–37, 307 Wis. 2d 1, 745 N.W.2d 1 (citation omitted). As the Legislature explains in its Revised Motion to Intervene, to which this provisional brief is attached, the Legislature satisfies the requirements for joinder as a matter of right under Section 803.09(1); *see* Rev. Mot. Intervene at 11-19. Dismissal of the Amended Complaint would be required, if the Legislature were not joined, because the Legislature is also an indispensable party. In "equity and good conscience," Wis. Stat. § 803.03(3), a case (1) that implicates the Legislature's core authorities and standard practices, (2) where no current party is committed to defending these prerogatives and practices and (3) where the named defendants have now moved to dismiss themselves or actively supported Plaintiffs' position, Rev. Mot. Intervene at 11-19, cannot proceed without the Legislature, *see Dairyland*, 2002 WI App 259, ¶ 9.

II. This Court Should Deny Plaintiffs' Motion For A Temporary Injunction

A plaintiff must make four showings to obtain a temporary injunction: (1) reasonable probability of success on the merits; (2) lack of adequate remedy at law; (3) irreparable harm absent injunctive relief; and (4) equities, on balance, favoring injunctive relief. *See Pure Milk Prods. Coop. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979); *Werner v. A. L.*

Grootemaat & Sons, Inc., 80 Wis. 2d 513, 519-20, 259 N.W.2d 310 (1977); *see also* Wis. Stat. § 813.02(1)(a). All injunctions, including temporary injunctions, are "extraordinary remed[ies]," *Wolf River Lumber Co. v. Pelican Boom Co.*, 83 Wis. 426, 428, 53 N.W. 678 (1892), and "are not to be issued lightly," *Werner*, 80 Wis. 2d at 520; *accord Pure Milk Prods. Coop*, 90 Wis. 2d at 788. Because a temporary injunction "is to a great extent a preventative remedy; and where the parties are in dispute concerning their legal rights, it will not ordinarily be granted until the right is established, especially if the legal or equitable claims asserted raise questions of a doubtful or unsettled character." *Mogen David Wine Corp. v. Borenstein*, 267 Wis. 503, 509, 66 N.W.2d 157 (1954) (citation omitted). This Court should deny Plaintiffs' Motion for Temporary Injunction because they have no reasonable probability of success on the merits, have not suffered irreparable harm to justify the injunction they seek, and the requested injunctive relief that would do far more harm than good.

A. Plaintiffs Have No Reasonable Probability Of Success On The Merits For Much The Same Reasons Explained In Part I

As explained in Part I, this lawsuit must be dismissed for multiple reasons, and therefore Plaintiffs have no reasonable probability of success on the merits. To avoid duplication of briefing, the Legislature fully responded to the arguments made in Plaintiffs' Motion for a Temporary Injunction in Part I.A. The Legislature here simply adds that even if this Court does not dismiss Plaintiffs' Amended Complaint, it should still hold that they have no reasonable probability of success because their core theory is entirely unprecedented, and is therefore, at the very minimum, of a "doubtful or unsettled character." *Id.* at 509.

B. Plaintiffs Have Failed To Established Irreparable Harms, And, In Any Event, An Injunction Would Do Far More Harm Than Good

A court may only grant a temporary injunction when necessary to prevent irreparable harm. *See Bubolz v. Dane Cty.*, 159 Wis. 2d 284, 296, 464 N.W.2d 67 (Ct. App. 1990). To carry this burden, Plaintiffs must show they are "likely to suffer irreparable harm if a temporary injunction is not issued." *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cty.*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154. Irreparable injury is a key prerequisite to injunctive relief; indeed, courts will not enjoin an even illegal act unless "the injury sought to be avoided is actually threatened or has occurred." *Joint Sch. Dist. v. Wis. Rapids Educ. Ass'n*, 70 Wis. 2d 292, 311, 234 N.W.2d 289 (1975). And even if Plaintiffs can establish that they will likely suffer irreparable harm, any relief requested must be "tailored to the necessities of the particular case." *State v. Seigel*, 163 Wis. 2d 871, 890, 472 N.W.2d 584 (Ct. App. 1991); *see Bachowski v. Salamone*, 139 Wis. 2d 397, 414, 407 N.W.2d 533 (1987) ("[T]he injunction is drafted too broadly and is therefore invalid."). Accordingly, an injunction is unlawful if it is "more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (citation omitted); *accord Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) ("A plaintiff's remedy must be tailored to redress the plaintiff's particular injury."); *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1272 (7th Cir. 1995) ("[A] court abuses its discretion where the scope of injunctive relief 'exceeds the extent of the plaintiff's protectible rights.'") (citation omitted). And an injunction should not be issued if it does more harm than good, as a matter of public policy. *See Sunnyside Feed Co. v. City of Portage*, 222 Wis. 2d 461, 473-74, 588 N.W.2d 278 (Ct. App. 1998) (reversing trial court's denial of an injunction because "the trial court did not consider relevant factors," including "public policy").

In the present case, Plaintiffs do not even attempt to establish irreparable harm flowing from the vast majority of the provisions that they ask this Court to enjoin, and cannot show that their requested injunction would do more harm than good as to any provision or confirmation. While Plaintiffs make a boilerplate allegation that all the laws should be enjoined because they violate some Plaintiffs' mission in support of "constitutional governance," TI Mot. 24, an injunction is an "extraordinary remedy," *Wolf River*, 83 Wis. at 428, and must be founded upon provision-specific showing of harm and particular balance of the equities, *see Milwaukee Deputy Sheriffs*, 2016 WI App 56, ¶ 20; *Joint Sch. Dist.*, 70 Wis. 2d at 311; *Seigel*, 163 Wis. 2d at 890; *Bachowski*, 139 Wis. 2d at 414. Accordingly, this Court must consider each provision and appointment that Plaintiffs seek to have blocked. Plaintiffs fail entirely on this score, often not even discussing either irreparable harm or equities for many of the provisions that they ask this Court to block.

Tax Law Changes. Sections 1-16 and 20-21(1) of 2017 Wisconsin Act 368, and Sections 84e-85r of 2017 Wisconsin Act 369 change various tax laws relating to out-of-state retailer sales, taxation of partnerships, limited liability corporations and S corporations, and verification requirements for certain tax credit recipients. Plaintiffs do not even attempt to show that they would suffer irreparable harm from any of these provisions. On the other side of the equitable balance, an injunction blocking these provisions would needlessly introduce uncertainty into the financial plans of individuals and businesses, including in the changing area of interstate taxation of out-of-state retailers, in light of the U.S. Supreme Court's decision in *South Dakota v. Wayfair*.

Transportation Project Provisions. Sections 17-18 and 21(2) of 2017 Wisconsin Act 368 make several changes in transportation projects, including requiring more federal dollars (and thus less State tax dollars) for highway projects. Enjoining these provisions could well introduce serious confusion into the legality of certain highway projects, especially if the Legislature

ultimately prevails in this litigation and statutorily ineligible projects move forward in the interim. An injunction against these provisions would also needlessly deprive political subdivisions of information relating to federally funded highway projects coming to their areas.

Changes to Certain Voting Provisions. Sections 1, 1B, 1C, 1D, 1E, 1F, 1FG, 1FM, 1G, 1GC, 1GD, 1GF, 1H, 1I, 1J, 1JB, 1JS, 1K, 1L, 1M, 1MG, 1MP, 1MQ, 1MS, 1MT, 1MV, 1N, 1NG, and 91-95 of 2017 Wisconsin Act 369 codify preexisting regulations relating to Wisconsin's voter ID law, loosen regulations for military and oversee electors, and expand the statutory window for in-person absentee voting. *See supra*, at 8-9. Plaintiffs repeatedly assert that they will be irreparably harmed by the in-person absentee voting changes of Section 1K of 2017 Wisconsin Act 369, as well as the codification of some Department of Transportation voter ID regulations by Sections 91-95 of 2017 Wisconsin Act 369. *See* TI Mot. 20-23, 25, 36-38. But as explained above, *see supra*, at 23-24, the changes to in-person absentee voting make state law *more* voter friendly than preexisting state law, assuming no federal injunctions, and have absolutely no impact on the status quo, if one accounts for the extant federal injunctions. The voter ID provisions, in turn, simply codify already binding Department of Transportation regulations. *See supra*, at 8-9. Plaintiffs therefore would suffer no harm, let alone irreparable harm, absent injunctive relief. Plaintiffs do not even purport to allege harms from the remaining provisions in this category, including the provisions that make absentee voting easier for overseas and military voters. In fact, enjoining these provisions threatens to harm these very voters, by limiting their options, while threatening to bring Wisconsin out-of-compliance with the federal Uniformed and Overseas Citizens Absentee Voting Act.

Provisions Relating to the Conduct of State Litigation. Sections 3, 5, 7-8, 26-30, and 97-103 of 2017 Wisconsin Act 369 include, *inter alia*, various provisions that limit the Attorney General's authority to settle away the validity of state law, permit the Legislature to intervene to defend State

law, and require the Attorney General to place settlement funds into the general fund, instead of allowing certain discretion to the attorney general in the expenditure of those funds subject, in select circumstances, to approval by the Joint Committee of Finance. The recent events in both this case and the *SEIU* litigation show why these provisions are so essential. In this case, no party has defended numerous State provisions and the Attorney General has not attempt to intervene to defend those provisions. *See supra,* at 27. In *SEIU*, the Attorney General has taken the position that he will *attack*, rather than defend, Wisconsin state law, contrary to the Wisconsin Supreme Court's decision in *Oak Creek*, 2000 WI 9, ¶¶ 22-23, 23 n.14. These actions attest to the pernicious practice that these new provisions are designed to ameliorate. Absent these new laws, the Attorney General would be able to concede away the validity of state law, or refuse to defend state law, potentially leading to the elimination of state statutes—enacted by the Legislature and signed by the Governor—without adversarial litigation. Already devoid of the power "to [bring] a specific action" not "granted by law," *In re Estate of Sharp*, 63 Wis. 2d 254, 261, 217 N.W.2d 258 (1974), these statutes merely affirm the corollary: that he cannot, by either action or inaction, negate that which the law has granted. Furthermore, if this Court enjoins these provisions and the Attorney General thereafter settles away the validity of state law or withdraws from litigations, the legal effect of the Attorney General's interim actions on these litigations would cause needless confusion if the Legislature ultimately prevails in this litigation.

Plaintiffs argue that some of these provisions will delay some settlements and lead to less efficient allocation of certain settlement funds. TI Mot. 34-35. While several of these provisions will require the Attorney General to work cooperatively with the Legislature when he wishes to settle away the legality or other basis of validity of state law, or take certain other actions, and will give the Legislature—the branch constitutionally responsible for state funds, Wis. Const. art. VII

§ 2, and art. VIII § 5—more direct control over State funds, those changes benefit, rather than harm, the public interest. After all, the Wisconsin Constitution is a document "of shared and merged powers of the branches of government rather than an absolute, rigid and segregated political design." *Martinez* 165 Wis. 2d at 696. By actively encouraging and explicitly requiring cooperation between the branches, these provisions advance that constitutional design and thus benefit the citizenry.

Guidance Documents Provisions. Sections 31, 38, 65-71, and 96 of 2017 Wisconsin Act 369 subject guidance documents to public notice-and-comment and litigation challenges. Plaintiffs argue that it will cost money for agencies to ensure that guidance documents comply with the law, TI Mot. 29, 32-33. But the people of Wisconsin, including Plaintiffs, will benefit from measures, such as these provisions, that ensure that State's actions comply with the law, using well-established, broadly respected procedures such as notice-and-comment and litigation in Wisconsin courts, consistent with the rest of Chapter 227. *See* Wis. Stat. §§ 227.112(1), (6)-(7); *id.* §§ 227.40(1)-(4). Further, enjoining these provisions will harm the public interest because it would needlessly cut short the period of time available for compliance with the statutory July 1, 2019 deadline for publicly noticing extant guidance documents, should the Legislature prevail in this case. Lastly, any such decision would also undermine the Legislature's constitutional authority to "maintain some legislative authority over rule-making," which is "incumbent . . . pursuant to its constitutional grant of legislative power." *Martinez*, 165 Wis. 2d at 701.

Legislative Oversight Provisions. Sections 10, 16, 18, 23, 39, 64, 87, and 90 of 2017 Wisconsin Act 369 and Sections 11-13 of 2017 Wisconsin Act 370 create additional oversight by legislative committees and the Legislature, over a range of different issues, consistent with the cooperative, interbranch regime that the Wisconsin Supreme Court unanimously upheld in

Martinez, 165 Wis. 2d 687. Blocking these provisions would undermine this cooperative regime, which is at the heart of Wisconsin's system "of shared and merged powers of the branches of government," *Martinez* 165 Wis. 2d at 696. Plaintiffs make no mention of several of most of these provisions, meaning that they have failed to even attempt to establish irreparable harm from them. Plaintiffs claim harms from Sections 10 and 13 of 2017 Wisconsin Act 370, *see* TI Mot. 25, 27-28, which require a legislative enactment before the Wisconsin Department of Health Services can take certain enumerated actions with federal agencies, and submittal of plans to the Joint Committee on Finance before the Wisconsin Department of Health Services may seek federal approval for certain proposed amendments to Wisconsin's Medicaid program if the economic impact exceeds 7.5 million. As for purported irreparable harms, the Plaintiff amorphously alleges Section 10 will "frustrate[]" its ability to work with state agencies, "hinder" its ability to carry out its purpose or result in the potential "diver[sion]" of a Disability Rights Wisconsin's resources. TI Mot. 35-36. Even more nebulously, Plaintiffs complain that the oversight introduced by Section 13 may result in certain amendments not being adopted in a timely manner or chilling the Department of Health Services from moving forward with potential amendments. *See* TI Mot. 27. In other words, Plaintiffs fail to even claim the predicate act—that the Wisconsin Department of Health Services has or will take an action subject to these provisions—let alone articulating how this predicate act will result in actual irreparable harm to Plaintiffs.

Miscellaneous Agency-Related Provisions. Sections 20-21, 35, 37, 80 and 85 of 2017 Wisconsin Act 369 allocate certain moneys received by the Department of Justice, prohibit agencies from relying upon federally submitted plans or settlement agreements as the basis for promulgating new rules, extend authority of the Department of Natural Resources relating to certain flood control projects, and codify the holding in *Tetra Tech*, 382 Wis. 2d 496, which

eliminated deference to agency interpretations of law. Plaintiffs have nothing to say about most of these provisions, and the public will suffer harms from the elimination of these provisions, including undermining the authority of the Department of Natural Resources over certain flood control projects. While Plaintiffs claim that they will suffer harm resulting from the prohibition on deference to an agency's conclusion of law, TI Mot. 29-30, 33-34, as explained above, *see supra*, at 10, 25, no harm could possibly occur from these provisions because they simply codify the Wisconsin Supreme Court's holding in *Tetra Tech*.

Prohibition on Certain Re-Nominations. Section 4 of 2017 Wisconsin Act 369 prohibits the Governor from re-nominating individuals whom the Senate has already rejected. Plaintiffs do not argue that this provision will harm them, and enjoining this provision would perpetuate a wasteful practice, which benefits no one.

Codification of Certain Federally-Approved Plans. Sections 14-17, and Sections 38-43 of 2017 Wisconsin Act 370 codify into state law a federal waiver for programs for childless adults that was recently approved by the United States Department of Health and Human Services, and provide for the implementation the State's reinsurance program for health carriers recently passed in 2017 Wisconsin Act 138, in accordance with the terms and conditions of the Department of Health and Human Services' approval on July 29, 2018. Additionally, Section 17 codifies reforms aimed at strengthening drug screening, testing, and treatment regulations for able-bodied adults participating in certain public assistance programs as federally approved by the Centers for Medicare and Medicaid Services on October 31, 2018. To the extent Plaintiffs even address these provisions, they ignore that each provision involves the implementation of existing programs by Wisconsin executive agencies or ensuring that Wisconsin law conforms to the terms and conditions

as required by the federal government. The codification of these existing programs cannot possibly justify the "extraordinary remedy," *Wolf River*, 83 Wis. at 428, of a temporary injunction.

Codification of Unemployment Insurance Job Search Regulations. Sections 27-38 of 2017 Wisconsin Act 370 codify the Department of Public Works administrative regulations concerning job search requirements necessary to receive unemployment. Plaintiffs make no argument that these provisions harm them or the public in any respect.

Directing Appropriations to Workforce Training Programs. Sections 1-9, 18-26, 44(1), and 45 of 2017 Wisconsin Act 370 appropriate separate moneys to various workforce training programs instead of the prior combined appropriations. Again, Plaintiffs make no arguments that these provisions impose any harm, let alone irreparable harm, on anyone.

Confirmation of Eighty-Two Appointees. If this Court enjoins the Legislature's confirmation of eighty-two appointees, this will place each of these positions in limbo, causing needless confusion in numerous bodies and boards throughout state government, while taking a human toll on these eighty-two individuals. Such an action would be particularly disruptive if the Legislature prevails at the end of this litigation, with eighty-two individuals having their positions needless called into question. Plaintiffs devote only a single sentence in their Motion for a Temporary Injunction to justify imposing this significant harm, TI Mot. 34, relying exclusively on boilerplate taxpayer costs. Plaintiffs do not argue, for example, that any of the eight-two appointees are performing their jobs in an unsatisfactory manner.

More generally, granting *any* temporary injunction based upon Plaintiffs' theory would throw the laws of Wisconsin into chaos, far beyond the provisions that the Legislature enacted in December 2018. If this Court—a circuit court of this State—were to hold that Plaintiffs are entitled to "extraordinary" relief on their theory that any action that the Legislature takes during a non-

prescheduled floor period is unconstitutional, and therefore is null and void, it is hard to overstate the disruption and uncertainty that would ensure. In the criminal law realm, lifetime sex offenders, drunk drivers, and those seeking bail release will immediately call upon the courts of this State to relieve them of the alleged "ultra vires" laws. *See* 1979 Wis. Sess. Laws 805, ch. 112; 1997 Wis. Act 326; 2009 Wis. Act 100; 2017 Wis. Act 185. Indeed, *any* criminal apprehended by a sheriff or prosecuted by a district attorney would presumably be able to argue that the state officials who took these actions had no authority to do so, because one of the necessary steps in the constitutional amendment process, which led to the amendment that set the current terms for sheriffs and district attorneys, took place during an extraordinary session. *See* Assemb. J. Res. 43; *see* Wis. Stat. § 974.06(2) (providing that a prisoner can seek post-conviction relief "at any time"). Lawsuits from public interest groups opposed to government funding of sports arenas can be expected to challenge the legality of the $250 million dollars spent on the Milwaukee Bucks arena, which the Legislature authorized during an extraordinary session. 2015 Wis. Act 117. More generally, the exact scope of the chaos is impossible to limit *ex ante*, as the Legislature enacted two recent budget bills, appropriating tens of billions of dollars, during extraordinary session, *see* 2011 Act 32; 2015 Wis. Act 55, while enacting many hundreds of statutory provisions, over several decades. To unleash this rolling disaster upon the State, based upon such an unprecedented theory is, frankly, unthinkable. Notably, Plaintiffs have not even attempted to articulate a limiting principle upon their capacious theory, nor does any such limiting principle come immediately to mind.

C. If This Court Is Inclined To Grant Any Portion Of Plaintiffs' Motion, It Should Issue An Immediate Stay Pending Appeal Or, At Minimum, Allow For Briefing Regarding A Stay Before Any Injunction Issues

If this Court is inclined to grant any aspect of Plaintiffs' Motion for a Temporary Injunction, the Legislature would plan to seek an immediate and/or emergency appeal. Given the entirely unprecedented nature of Plaintiffs' legal arguments, the equities, and the harms flowing from an

injunction discussed above—including calling into doubt decades of laws and constitutional amendments—the Legislature respectfully submits that a stay pending appeal would be appropriate under *State v. Gudenschwager*, 191 Wis. 2d 431, 439, 529 N.W.2d 225 (1995). But, at the absolute minimum, the Legislature would like the opportunity to more fully brief the issue of a stay pending appeal, prior to the Court's imposition of any form of injunctive relief.

CONCLUSION

This Court should grant the Legislature's Motion to Dismiss and deny Plaintiffs' Motion for a Temporary Injunction.

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